local governments "authority to regulate the entry of or the rates charged" by mobile radio service providers. However, right-of-way management and compensation requirements are neither "entry" nor "rate" regulation, and § 332(c)(3) does not affect those requirements.[53]

B. The Local Government Requirements That Are Not Plainly Protected by § 253(c) Are Nonetheless Appropriate Exercises of Local Government Authority and Do Not Prohibit Entry in Violation of 253(a).

Section 253(a) does not authorize preemption of every local government requirement that falls outside the parameters of the authority expressly protected by § 253(c). A local government requirement that is not addressed to right-of-way management or compensation is still a legitimate exercise of sovereign authority and cannot be preempted unless it can be determined that it "may prohibit or have the effect of prohibiting" competitive entry.

In this regard, comments point to § 253(b) and argue that local governments cannot impose consumer protection requirements because that authority is allocated to the state.[54] The question, however, is whether the requirement "may prohibit or have the effect of prohibiting" telecommunications services under § 253(a). Section 253(b), like §253(c), is a "safe harbor." It does not restrict local government authority, and it does not restrict state delegation of state authority. The state authority recognized under § 253(b) can be delegated and exercised by any "division" of the state, including municipal and county governments.

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52 Comments of AT&T at 9.
53 NOI at ¶ 74.
54 *See, e.g.,* Comments of AT&T Corp. at 11; *See, e.g.*, Comments of Cox Communications at 25.

In this regard, some commenters advance the broader argument that even the local government authority expressly acknowledged and protected by § 253(c) cannot be upheld unless it has been expressly conferred by the state government in exacting terms.[55] However, the manner and terms under which local authority is derived or state authority is delegated is not a subject on which either Congress may legislate or the Commission may regulate without violating the Tenth Amendment and the Guaranty Clause of the Constitution. The allocation or assignment of state authority, whether by the governor to the lieutenant governor, or by the state legislature to a charter city or home rule county, is simply not a matter on which any part of the federal government is entitled to an opinion that matters.

C. Fair and Reasonable Compensation Cannot Be Limited To Cost Recovery Consistent With the Plain Language of Section 253(c), the Legislative Intent, or the Fifth Amendment.

Industry commenters share a unanimous view that they should be permitted free or subsidized use of the public right-of-way. The Commission should not be surprised. The claim that local governments should be limited to " actual costs" associated with providing right-of-way access is no more than a bald and extraordinarily bold request that the Commission hand over to the industry valuable public property, over which the Commission has no dominion, and to which the industry has no entitlement. Public rights-of-way are public property held by local governments in trust for taxpayers.

At the threshold it is clear that there is no textual warrant, nor any implication to be drawn from the legislative history, which supports a reading of § 253(c) that confines local governments to the recovery of costs associated with the management of right-of-way access.

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[55] *See, e.g.*, Comment of *AT&T* at 25.

Even if such a limitation could be tweezed from the "fair and reasonable" language of § 253(c), there is no basis for concluding that local compensation requirements imposed on a competitively neutral basis -- whether they are denominated rental fees, license fees, franchise fees, business taxes, or something else -- either "may prohibit or have the effect of prohibiting" the offering telecommunications service in violation of § 253(a). Beyond those very apparent shortcomings of the industry comments, there is lurking a significant constitutional barrier to their claim of entitlement to public property at the cost of conveyance -- the Fifth Amendment's takings clause.

Federal interference with local compensation requirements threatens only to skew the market. In addition to the argument that fees must be limited to costs, some commenters have argued that local governments should not be allowed to impose rents on cable operators in respect of their new telecommunications services.[56] It is also argued that local governments should not be allowed to exact fees in connection with the offering of cellular telephone and other wireless telecommunication services.[57]

Each of these challenges is predicated on the false premise that the safe harbor of § 253(c) can be narrowly construed -- to allow only the recovery of costs associated with physical occupation of the right-of-way -- and that § 253(c) describes the full extent of local authority. However, neither premise withstands even cursory analysis. "Fair and reasonable compensation" is not amenable to a construction that would limit local governments to the

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[56] Comments of Cox Communications at 31-34; Comments of Media One at 11; Comments of National Cable Television Ass'n at 11-13.

[57] Comments of AT&T at 14-16; Comments of BellSouth Telecommunications at 7; Comments of Sprint at 11-12; Comments of Teligent at 8-10.

recovery of their costs except in complete defiance of the general rule that express preemptions are to be narrowly construed to preserve historical state and local authority. Nor can § 253(c) be cast as a description of the full scope of local authority over carriers who are doing business in local jurisdictions. Section 253(c) is simply a safe harbor, and local authority is otherwise unaffected except inasmuch as it "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

Each of these attacks on local fiscal policies represents only a thinly disguised prayer for subsidized use of public property for a competitive advantage. Requiring local governments to price right-of-way access "at cost" rather than at "fair market value" would amount to a forced local subsidy to telecommunications providers that desire right-of-way access as a component of their service. Such a federal gift of local property would operate to disadvantage other competitors, such as satellite-based and wireless providers which do not "use" local rights-of-way. Further, many wireless providers are also wireline users of rights-of-way. Exempting wireless carriers who do use rights-of-way in some parts of their local networks from generally applicable telecommunications franchise fees provides them a competitive advantage over traditional wireline carriers. Exempting telecommunications services offered over cable platforms would tilt the telecommunications market in favor of cable operators. Exempting resellers from generally applicable franchise fee requirements would advantage incumbent facility providers and discourage the development of facility-based competition – the ostensible purpose of the Commission's proceeding.

Local compensation requirements cannot be limited to cost-based formulations without raising significant problems under the Fifth Amendment to the Constitution. Statutory constructions that raise constitutional questions are to be avoided.[58]

The crabbed construction of "fair and reasonable" compensation in § 253(c) advocated by industry commenters is decidedly at odds with the Congressional history surrounding the provision. The language that became subsection (c) originated by amendment in both houses, but only on the House side was adoption of the amendment accompanied by illuminating controversy as we recounted exhaustively in our initial comments.[59] The end result of this controversy was the rejection of an amendment regarding this language because it did not go "the entire way" in protecting local governments' property rights in and police power over the rights-of-way and the adoption of another which in the words of one of its sponsors (Congressman Barton) "explicitly guarantees that cities and local governments have the right to not only control access within their city limits, but also to set the compensation level for the use of that right-of-way…."[60] The construction of § 253(c) advocated by industry commenters would put the Commission in precisely the role that Congress sought to avoid — telling the localities how to price rights-of-way.

More fundamentally, the industry's asserted interpretation of § 253(c) would deprive local governments and their constituents of the value of their property. Public rights-of-way are

[58] *See, e.g., Dept. of Commerce v. House of Representatives*, 119 S.Ct. 765, 779 (1999), *quoting Spector Motor Svc. v. McLaughlin*, 3232 U.S. 101, 105 (1944) (no more deeply rooted doctrine of constitutional adjudication). *See also, Bell Atlantic v. FCC*, 306 U.S.App.D.C. 333, 24 F.3d 1441 (1994).

[59] *See,* Comments of Local Gov't Coalition at 39-41.

[60] 141 Cong. Rec. for August 4, 1995, at H 8460 (*daily ed.*)

property rights protected by the Fifth Amendment from a governmental taking without payment of compensation. A County's roads are no different from the municipal landfill in *U.S. v. 50 Acres of Land,*[61] where a unanimous Court held that the reference to "private property" in the Takings Clause of the Fifth Amendment encompasses the property of local governments when it is condemned by the United States.[62]

The federal courts, led by the Supreme Court in *City of St. Louis v. Western Union Tel.*,[63] and recently ratified by the Fifth Circuit in *City of Dallas v. FCC,*[64] recognize that local governments have the normal rights of all property owners in controlling all elements and benefits of this property. Thus, when a local government "franchises" a telecommunications operator related to some right-of-way use privilege, the local government is conveying a limited property interest to the "franchisee" — a personal, revocable right to use the public right-of-way, strictly limited as specified by the terms of the franchise. A franchise is a form of property conveyance, similar to but different from and more limited than a lease or sale.

Telecommunications providers placing their facilities in public rights-of-way enjoy no less a permanent physical occupancy requiring compensation than the cable company hanging its cables from and across Mrs. Loretto's apartment building in *Loretto v. TelePrompter Manhattan,*[65] and providers placing their switching equipment in the Plaintiff Company's central

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[61] *U.S. v. 50 Acres of Land*, 469 U.S. 24, 31 (1984).
[62] *See also, U.S. v. Carmack,* 329 U.S. 230, 242 (1946).
[63] *City of St. Louis v. Western Union Tel.*, 148 U.S. 92 (1893), opinion on reh'g, 149 U.S. 465 (1893).
[64] *City of Dallas v. FCC*, 118 F.3d 393, 397 (5th Cir. 1997).
[65] *Loretto v. TelePrompter Manhattan*, 458 U.S. 420 (1982).

offices in *Bell Atlantic v. FCC*.[66] The question has actually been decided as to streets by the U.S. Supreme Court in *City of St. Louis*, where the Court held that the City was entitled to rent as a demand of proprietorship.[67]

Section 253 cannot reasonably be read as authorizing a taking of thirty-six thousand local governments' rights-of-way that would warrant compensation to be awarded in the Court of Claims.[68] As the D.C. Circuit made clear in *Bell Atlantic*, the Congress did not confer the power of eminent domain on the Federal Communications Commission's regulatees. Indeed, even in the former Post Roads Act,[69] Congress itself made no attempt to confer such authority on telecommunications providers. In *City of St. Louis*, the Court made it perfectly clear that even Congressional authorization of carriers' use of post roads did not carry with it the power to take non-federal property without compensation.[70]

Industry comments characterize right-of-way access compensation requirements as an attempt to milk this new "cash cow,"[71] but their rhetoric should not be allowed to mask the simple fact that this is compensation paid by a user who *receives a special benefit in return* for

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[66] *Bell Atlantic v. FCC*, 306 U.S.App.D.C. 333, 24 F.3d 1441 (1994).

[67] *City of St. Louis*, 148 U.S. at 97; *accord*, *City of Dallas*, 118 F.3d 393.

[68] *Cf. Blanchette v. Conn. Gen. Ins.*, 419 U.S. 102, 134-36, 148-50 (1974) (Regional Rail Reorganization Act cases).

[69] In the former Post Roads Act of 1866, 14 Stat. 221, Congress extended to state-chartered telegraph companies the same authority to use public lands as had been granted the federally chartered Pacific railroads and their telegraph affiliates over the alternate sections of public lands that were not part of their land grants. In the two opinions cited in the text above, the Supreme Court rejected the contention that 1866 Act gave Western Union the right to occupy municipally-owned land rent-free.

[70] *See*, *Western Union Tel. v. Pennsylvania R.R.*, 195 U.S. 540 (1904), *citing Western Union Tel. v. Ann Arbor Ry.*, 178 U.S. 239 (1900).

[71] *See*, Comments of RCN Telecom Services at 5; Comments of AT&T at 23.

that payment – consideration in the classic contractual sense. Just as the proceeds of the Commission's spectrum auctions take the place of revenues the federal government would otherwise have to raise through taxation, local governments are entitled to maximize the value of a scarce local resource to address revenue requirements. As compelling as the federal government's interest in encouraging competition in telecommunications may be, there is no basis in law or logic for requiring local governments to subsidize competitors by turning over a valuable asset at cost.

Finally, even if the Commission were to accept the premise that the compensation requirements of local governments can be limited to the recovery of costs associated with right-of-way management, the industry commenters who make that argument vastly underestimated the amount and different types of those costs, and have offered the Commission no basis for evaluating compensation requirements under that criteria. None of the industry commenters appear to take into consideration such costs as: necessary capital expenses for acquisition, construction, improvement and replacement, including depreciation for wear and tear and other difficult to quantify costs such as the reduction in the life-span of the pavement; maintenance, repair, standard out-of-pocket and other administrative expenses. In addition industry commenters appear to simply ignore "externality costs" such as disruption to abutting land owners; the costs imposed on other businesses and citizens who are forced to use the public right-of-way in a more inefficient way; damages caused to vehicles and pedestrians; increased costs to other utilities forced to internalize increased costs now that the public right-of-way is more complicated by a net of spaghetti facilities to "work around" for even simple repairs; and a reasonable share of the allocation of the joint and common costs of public right-of-way, at a minimum equal to TLRIC.[72] Moreover, local governments have only begun to experience the administrative costs associated with the exploding demand for access to the right-of-way, and the increasing toll that demand will necessarily take. There is not now sufficient experience to build a record, much less a sufficient record to construct rules of general application.

Some industry commenters argue that resellers cannot be subject to rents imposed by local governments because they do not physically occupy the right-of-way. As we discussed more fully in our initial comments, such a rule, in addition to preventing the community from receiving the full value of its property, lends itself to evasion through juggling corporate structures and intra-corporate transfer payments.[73] Furthermore, resellers are "using" the rights-of-way and derive an economic benefit from their use of the rights-of-way. Indeed, the exemption of resellers from any local compensation requirement would only discourage investment in new facility-based competition in favor of reliance on facilities owned by the incumbent, since resellers would gain a competitive advantage over facilities-based providers.

Property rights are both tangible and intangible. Physical occupancy and trespass are not the only "uses" of real property. Liens, ownership restrictions, inchoate rights of use are examples of intangible, but highly valuable, "uses" of property. A decision by a community to grant a franchise to a cable operator is an intangible asset that Generally Accepted Accounting Principles (GAAP) permits to be carried as an asset on the grantee's financial statements. If that franchise does not obligate, but simply permits, the franchisee to build, the franchise is

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[72] The cost studies in our initial comments have documented, for example, how repeated street cuts reduce the useful life of a street, even if the surface is "repaired" by the company making the cut. *See* Comments of Local Gov't Coalition at Attachment C. FCC Local Competition Report: August 1999, Table 4.2.

potentially more valuable. This unrestricted right to build anywhere in the community over a specific period of time is an encumbrance on the public right-of-way—even if the grantee chooses never to build. As long as the franchisee holds that right, it is an inchoate "use" of the public right-of-way and warrants compensation. Contrast that example with a limited grant to a company to connect two separate industrial sites in the community with LAN wire. This grant of a right to build a mile or two of wire down a specific street, with no right to go elsewhere is of limited value to the company—it probably could get the same service from the incumbent telephone company at close to the cost of construction. Yet the industry argues that the latter "physical occupancy" is the only "use" which can be compensated. The former "go anywhere, anytime" property right is not a "use" and therefore is not compensable. In other words, only the less valuable grant is compensable. In this *Alice in Wonderland* Kingdom, normal rules of economics and property law do not apply.

D. The Competitive Neutrality and Non-discriminatory Requirements of Section 253(c) Are Not Offended by Local Government Requirements.

Industry commenters argue that the exemptions afforded other telecommunications providers violate § 253(c).[74] These commenters are not arguing that their own particular service (*e.g.* wireless, cable) ought to be exempt from local government rents. Of particular concern to competitive locals exchange carriers ("CLECs") is an alleged "incumbency advantage" enjoyed by the incumbent local exchange carrier ("ILEC") and arising out of the ILEC's claimed

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[73] *See,* Comments of Local Gov't Coalition at 31.

[74] *E.g.*, Comments of Association for Local Telecommunications Services at 8.

exemption, under state law, from having to pay compensation to local governments for access to the public right-of-way.[75]

At the outset, it is clear that this incumbency advantage, to whatever extent it is real, is by and large a function of industry history that predates the advent of competition. In some cases, this history has been embodied in state statutes. Local right-of-way regulation and compensation requirements, which are in their own terms "competitively neutral and non-discriminatory," are protected by the safe harbor of § 253(c). The fact that the uniform application of a "competitively neutral and non-discriminatory" local regulation is or may be thwarted by grandfathered or vested rights of the incumbent telephone company under state law does not remove the local regulation from the safe harbor of § 253(c). As a result, the legality of any disparity in the treatment of ILECs and CLECs, which may result from a claim of right or privilege under state law can only be evaluated, if at all, under § 253(b).[76]

Secondly, the scope of the identified problem is far from clear. ILECs have asserted in some jurisdictions the benefits of a claimed state franchise to dispute the application of local right-of-way management and compensation requirements.[77] Those assertions are in no event undisputed, and in most events dubious. Moreover, they are in all events questions of state law, which the Commission is hardly in a position to resolve in the first instance. State law will govern the construction of the state statute that ostensibly confers the incumbency advantage, the

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[75] *See e.g.,* Comments of Cablevision Lightpath, and Nextlink Communications at 4; Comments of MediaOne at 6; Comments of ALTS at 15.

[76] *TCG v. City of Dearborn*, 16 F. Supp. 2d 785, (E.D. Mich. 1998), *appeals pending*, Sixth Circuit Nos. 98-2034, -2035.

scope of rights claimed by the incumbent under that statute, and the rights of the claimant as a putative successor in interest to the original beneficiary of the state grant. These issues are highly-specific and idiosyncratic. They are not amenable to broad-brush characterization on a nationwide basis. In short, the Commission must first defer to a state-level determination of whether there is in fact and law an incumbency advantage, or whether instead the incumbent is only taking advantage of an historical supposition borne of an outdated model of telecommunications as a monopoly utility service.

In its assessment of the scope and effect of the alleged incumbency advantage, the Commission needs to maintain a healthy skepticism in light of the source of the complaint. CLECs argue generally that the discriminate application of right-of-way compensation requirements has the affect of thwarting competition, but they have been notably reticent to identify and describe the existence and scope of the problem in specific jurisdictions. That is, of course, because their agenda is not so much to redress the disparity by denying the incumbent the benefit of its alleged advantage, as it is to redress the disparity by denying local governments fair and reasonable compensation for the use of public rights-of-way.

We submit that the record as it stands in this proceeding is inadequate to assess the extent to which incumbents enjoy an actual advantage in terms of right-of-way compensation obligations, and that it would behoove the Commission to conduct a further inquiry expressly directed to the impact of state franchise grants, and claimed grandfather rights under state law upon the development of fair and efficient competition.

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[77] *See e.g.*, *Bell Atlantic-Maryland v. Prince George's County*, 1999 WL 343646 (D.Md. May 24, 1999); *TCG Detroit v. City of Dearborn,* 16 F.Supp. 2d 785, 792 (E.D. Mich. 1998), *appeals pending*, Sixth Circuit Nos. 98-2034, -2035.

In addition, § 253(c) does not require that local governments impose exactly the same requirements on each telecommunications provider. All that is required is that the requirements imposed and the compensation sought be nondiscriminatory and competitively neutral.[78] Congress expressly rejected a "parity provision" that would have required the exact same fees be imposed on all telecommunications providers using the rights-of-way because local governments must be able to distinguish between different telecommunications providers based on their varying use of the rights-of-way.[79]

During the House debate on the "Barton-Stupak amendment," discussed *supra*, Congressman Stupak emphasized that the amendment deleted the requirement for parity between the incumbent local exchange carrier and other providers, and instead allowed different compensation from different providers for use of the rights-of-way. He stated: "Local governments must be able to distinguish between different telecommunications providers.... The managers' amendment states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the rights-of-way or rip up our streets. Because the contracts have been in place for many years, some as long as 100 years, if our amendment is not adopted, if the Barton-Stupak amendment is not adopted, you will have companies in many areas securing free access to public property. Taxpayers pay for this

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78 This is a proposition that even some of the industry commenters acknowledge. *See* Comments of Cablevision Lightpath and Nextlink Communications at 5. ("differential treatment of carriers that "use" local rights of way differently may be justifiable there is little dispute that a carrier that uses 100 fee of rights-of-way in a particular locality may be treated differently from a carrier using 100 miles of rights-of-way.")

79 *TCG Detroit v. City of Dearborn*, 16 F.Supp. 2d 785, 792 (E.D. Mich. 1998), *appeals pending*, Sixth Circuit Nos. 98-2034, -2035.

property, taxpayers paid to maintain this property, and it is simply not fair to ask the taxpayers to continue to subsidize the telecommunications companies...."[80]

In addition, Commission and judicial construction of the non-discrimination requirement of § 202 of the Act is instructive. For example, in *Competitive Telecommunications Association v. FCC*, the appellate court stated, "the first inquiry into whether a carrier is discriminating in violation of § 202(a) [of the Communications Act] is whether services are "like."[81] Local governments may properly take into account differences between carriers in their intensity of use of the right-of-way and other factors without running afoul of § 253(c).

Finally, it bears repeating that §§ 253(b) and 253(c) are safe harbor provisions. Requirements which do not fall within the safe harbors are nonetheless permissible unless they are squarely preempted under § 253(a) because they "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." If there is a case to be made that an <u>actual</u> incumbent's <u>actual</u> right-of-way access advantage has <u>actually prohibited</u> or even <u>may prohibit</u> someone, somewhere from offering a telecommunications service, that case has not been made in this proceeding.

There is no evidence that the alleged incumbency advantage associated with right-of-way management and compensation is pervasive or persistent; and it is by all appearances only isolated and incidental. Without more, much more, the Commission should be extremely reluctant to seize on this alleged incumbency advantage as an occasion for an intrusive foray into

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[80] Cong. Record August 4, 1995 H. 8460.

[81] *Competitive Telecommunications Association v. FCC*, 998 F.2d 1058, 1061, 302 U.S.App.D.C. 423, 426 (1993).

a realm of state and local law which has been the exclusive province of state and local authorities for 200 years.

V. THE COMMISSION HAS NO AUTHORITY TO PREEMPT TAX LAWS.

A. The Commission Has No Authority to Regulate State and Local Taxes.

The Commission has no jurisdiction to preempt state or local telecommunications taxes.[82] Some comments suggested eliminating all local taxes in favor a single state tax,[83] or preempting municipal taxation schemes.[84] However, Congress specifically denied the Commission the power to preempt state and local tax laws. In this proceeding, the Commission acknowledged – and telecommunication providers agreed[85] -- that the Commission lacks jurisdiction over state and local telecommunications tax laws, and in prior proceedings, the Commission has concluded state courts, rather than the Commission, are better suited to address state and local tax matters.

As the Commission acknowledged in the NOI, Congress did not authorize the Commission to regulate state or local taxes:

> Indeed, we note that our [the Commission's] legal authority to preempt State and local taxes is extremely limited. In particular, section 601(c)(2) of the 1996 Act provides, with limited exceptions, that "nothing in [the 1996] Act or the amendments made by [the 1996] Act shall be construed to modify, impair, or

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[82] As the National League of Cities accurately noted in its comments, there are only three exceptions to this prohibition: franchise fees, open video system fees, and direct broadcast satellite taxes. *See* Comments of Nat'l League of Cities at 18.

[83] Comments of Committee on State Taxation at 25 [COST]; Comments of United States Communications Association at 46 [USCA].

[84] Comments of Triton at 7.

[85] Comments of Sprint at 13.

supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation."[86]

In addition to the specific language of the statute, the stated congressional purpose of § 601(c)(2) was to prevent "affected parties from asserting that the bill impliedly preempts other laws."[87] Thus, despite urging from the telecommunications industry, the Commission may not use § 253 as a battering ram to strike down local and state tax laws. The Commission may not, under the guise of removing barriers to entry, attempt to modify, impair, or supersede, any State or local tax law.

In the context of the NOI, it is useful to revisit how the Commission had previously dealt with jurisdiction over matters of state and local taxation. In the NOI, several commenters remarked that telecommunications providers are subject to municipal right-of-way management fees and state and local taxes. This is not a new or unique situation faced solely by the telecommunications industry. The cable industry currently may be required to pay municipal franchise fees as well as state and local taxes. Yet despite the 'burden' of paying both fees and taxes, there has been phenomenal growth and expansion in the cable industry.

In a 1984 Cable Act rulemaking proceeding, the Commission reconsidered rules it had adopted to resolve cable franchise fee disputes.[88] The Commission previously rejected the

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[86] NOI at ¶ 84 (footnoting, 1996 Act, § 602(c)(2), published as a note to 47 U.S.C. § 152).

[87] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. at 201 (1996)(Conference Report).

[88] Amendment of Part 1, 63 and 76 of the Commission's Rules to Implement the provisions of the Cable Communications Policy Act of 1984, MM Docket No. 84-1296, *Memorandum Opinion and Order*, 51 FR 21770 (1986)("Reconsideration"), *aff'd, ACLU v. FCC,* 823 F.2d 1554 (U.S. App. D.C. 1987), *cert. denied, Connecticut v. FCC,* 485 U.S. 959, 108 S.Ct. 1220 (1988). At issue were rules designed to resolve various franchise fee disputes, such as what costs

approach suggested by Triton in its comments.[89] The Commission took the position that while it retained jurisdiction to adjudicate franchise fee disputes under the Cable Act, most franchise fee disputes would nonetheless, be best resolved through the courts.[90] The Commission offered three sound policy reasons as to why the Commission should not attempt to resolve state and local franchise fee and tax disputes: (1) courts are better suited to resolve disputes involving specific localized facts; (2) courts are the proper forum to resolve matters requiring interpretation of law; and (3) Congress intended to limit federal involvement in state and local taxation matters.

In the Reconsideration, the Commission concluded courts were better suited to adjudicate particular tax disputes. The Commission determined that "disputes involving whether a particular levy by a state is an impermissible franchise fee disguised as a tax" or "challenges to the constitutionality of a particular fee," should be directed to the courts because such disputes "will call for evidentiary showings that involve testimony from individuals or the production of exhibits that are located in the franchise community. These considerations make local courts the most convenient forum..."[91]

Numerous commenters complained about particular taxes imposed by local governments.[92] The Commission should adhere to its previous finding and defer to forums better

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should be counted towards the 5% statutory cap on cable franchise fees, whether local tax were actually impermissible additional franchise fees, etc.

[89] "The Commission must closely monitor municipal taxation schemes and pre-empt those schemes which truly are franchise fees." Comments of Triton at 7.

[90] The Commission position was briefed and summarized in *ACLU v. FCC*, 823 F.2d at 1563.

[91] *Id.*

[92] *See,* Comments of AT&T ; Comments of GTE Services Corp.; Comments of Personal Communication Industry Ass'n [PCIA]; Comments of SBC Communications.

suited to conduct extensive fact-finding and complex interpretation of constitutional, state and local law.

Additionally, in the Reconsideration, the Commission acknowledged that it lacked the expertise to resolve certain disputes. Some disputes "may not be resolved by simply making mathematical calculations." Rather, they "involved matters that called for interpreting contract provisions and matters of local taxation. ... We are therefore reluctant to exercise jurisdiction in areas where we have no expertise and where the relevance of the dispute to a 'national policy concerning cable communications' is slight." Similarly, in this proceeding, the Commission has no authority to consider a national telecommunications tax policy that would preempt state and local telecommunication tax laws. Furthermore, the Commission has no expertise in interpreting local tax policy, where as the courts have developed an extensive body of law regarding interstate taxation and taxation of telecommunications providers.[93] The Commission should therefore let courts and other bodies, as discussed *infra*, address state and local tax laws.

In the Reconsideration, the Commission noted that in the Tax Injunction Act,[94] Congress had forbidden federal courts to "enjoin, suspend or restrain the assessment, levy, or collection of any tax under State Law where a plain, speedy and efficient remedy may be had in the courts of such state."[95] The Commission stated, "[i]t would be anomalous for Congress to preclude federal court involvement to preserve the authority of the state decision-making machinery while

[93] *See e.g.*, *Goldberg v. Sweet*, 488 U.S. 252 (1988).
[94] 28 USC § 1341.
[95] Reconsideration, 60 RR 2d at 519.

simultaneously providing federal administrative agency authority over the same subject matter."[96]

Beyond having explicitly denied the Commission authority to preempt state and local tax laws, Congress has specifically charged other federal authority with examining the issue. The Advisory Commission on Electronic Commerce is empowered to "conduct a through study of Federal, State and local...treatment of transactions using the Internet...."[97] As part of its study, ACEC may include "the examination of ways to simplify Federal and State and local taxes imposed on the provision of telecommunications services."[98] Several parties submitting comments to the NOI have also submitted comments to the ACEC. In fact, 146 comments regarding the effects of, and proposals to reform state and local taxation schemes have been submitted to the ACEC.[99] Additionally, in the NOI, the Commission noted the Multistate Tax Commission and the Federation of Tax Administrators are working in this area.

Having directed the Advisory Commission to report back to Congress, Congress presumably reserved for itself the authority to address this complicated and politically sensitive issue. This Commission should respect that allocation of responsibility.

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[96] *Id.*
[97] 47 USC § 151(g)(1).
[98] 47 USC § 151(g)(2)(F).
[99] Most of these comments are available electronically at http:\\www.ecommercecommission.org.

B. The Comments Provided No Evidence That State and Local Tax Policies Constitute a Barrier to Entry.

Despite the volume of statistics cited in various comments,[100] not one comment supplied evidence that telecommunication providers are being deterred from entry into local markets because of state and local tax policies.

There was no evidence presented in the comments that state and local tax policies are inhibiting the development of competitive networks. Evidence that telecommunications providers are being taxed is not evidence that taxes create a barrier to competitive entry. The COST comments were widely cited in many comments as evidence of the burden of paying state and local taxes. The COST "survey" was created by having telecommunications providers inventory the taxes paid by telecommunications businesses versus taxes paid by a hypothetical "general business."[101] Leaving aside for the moment the flaws in the COST "study," it cannot go without notice that, despite having access to data from 17 different telecommunications providers,[102] the COST study did not cite a single instance where a telecommunications provider failed to enter a market because of state and local tax policies.

Furthermore, the COST study is flawed. It asserts that telecommunications companies pay more in taxes than other businesses in the same communities.[103] The reader is tempted to ask "so what?" Is that because telecommunications is more profitable? Less demand elastic? Who

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[100] *See e.g.*, Comments of COST; Comments of GTE Services Corp.; Comments of PCIA ; Comments of SBC Communications.

[101] A general business is "a seller of tangible personal property." Comments of COST at p.4.

[102] Comments of COST at 4. The following COST members supplied data for the "study:" AirTouch Communications, ALLTELL, Ameritech, AT&T, Bell Atlantic, BellSouth, Citizens Utilities Company, CommNet Cellular, Frontier, GTE, MCI WorldCom, Nextel, SBC Communications, Sprint, U.S.West, VoiceStream Wireless, and Western Wireless.

absorbs the tax burden? The stockholder or the customer? The study essentially means nothing. It did not compare the tax burdens of telecommunications businesses with comparable businesses like competitive services (*e.g.* courier, catering, janitorial, flower delivery). It did not compare tax burdens between telecommunications companies and other regulated businesses (*e.g.* airlines, broadcast stations, healthcare providers, housing developers). It did not compare tax burdens between telecommunications companies and other businesses that sell or produce intangible products (*e.g.* computer software developers, video programming, major motion picture studios). In other words, the COST study stands for the proposition that telecommunications companies pay taxes. The COST study shows no consequences, adverse or otherwise, of the current tax law structure.

This point must be emphasized. The comments, for all of the tax rate data compiled, did not cite a single example of a locality where the tax policies prevented a competitor from entering the market. Los Angeles, Miami, Chicago, Dallas, New York City, and Seattle were cited as the cities with the highest aggregate federal, state and local telecommunications taxes.[104] Yet, in each of these cities, a customer wishing to purchase wireless service can walk into a wireless merchant and have at least five providers from which to choose. The comments do not provide evidence that state and local taxes are a barrier to entry.

As the Commission itself noted, "[v]irtually all businesses are subject to a wide array of State and local taxes, and there is no reason that telecommunications businesses should be any exception." The bulk of tax-related comments supplied by the telecommunications industry simply argued that telecommunications providers should not be taxed at the local level because

[103] Comments of COST at 11.

operating in multiple tax jurisdictions is more complicated that operating in a single tax jurisdiction.[105] Many businesses, from McDonald's to Starbuck's to Border's Books to 7-11's have thousands of stores in hundreds of tax jurisdictions. These businesses are not arguing that local tax policies prevent them from operating multiple stores. They are not arguing that the only solution that will allow them to expand is to eliminate local taxation authority. Additionally, there are many commercially available tax reporting services that are available to assist businesses with state and local tax compliance.[106] While tax compliance may be complex, it is a normal cost of doing business in multiple jurisdictions.

Reasonable tax policy is not a barrier to entry. And to the extent that problems may arise in state or local tax policy, the normal mechanisms of legislative and judicial review are available to resolve them. As we stated in our initial comments, the four examples cited by the Commission in the NOI were resolved through the political or judicial process, or through the marketplace without need of Commission intervention.[107]

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[104] Comments of PCIA, Unintended Consequences Comments.

[105] Comments of COST at 25; Comments of Triton at 7; Comments of USCA at 10-11.

[106] *See e.g.*, www.ArizonaTax.com.

[107] (1) The petition by Western PSC I Corp. regarding the Oregon assessment of property tax on FCC licenses was subsequently withdrawn by Western after it negotiated a settlement with the Oregon Revenue Department. *See* Oregon Dept. of Revenue May 20, 1996, Notice of Proposed Tax Assessment.

(2) In *Ohio Cellular RSV Limited Partnership v. Board of Public Works of the State of West Virginia*, 189 W.Va. 416, 481 S.E.2d 722; 1996 W.Va. LEXIS 179 (1996), the West Virginia Supreme Court of Appeals affirmed the lower court's decision that an FCC license is not taxable personal property under W.Va. Code 11-5-3 (1961)(definition of personal property).

(3) The Kentucky House Bill, *1996 KY H.B. 125*, which would have imposed on commercial radio service providers an annual *ad valorem* tax of 1.5 cents for every $100 of value of an FCC license or permit, died in the state's Senate Committee on Appropriations and Revenue.

Local governments share the goal of the Commission and industry to encourage infrastructure development. Contrary to the comments of Sprint,[108] local governments are well aware of the correlation between economic growth and generation of tax revenues. While higher taxes may lead to higher revenues in the short run, local governments know that high tax burdens can stifle consumer demand and deter business development, leading to lower tax revenues in the long run. Local governments have always had to balance these concerns in setting property and business tax rates, and other regulations. Local governments are keenly aware that industry may use lower tax rates from another jurisdiction to threaten to relocate elsewhere. Additionally, local governments are aware that taxes are routinely both passed onto consumers and prominently identified on customer bills. The elected leaders of local governments must stand for election. When consumers want tax repeal, the taxes are repealed, or elected officials get replaced at election time. The Commission itself stated in the NOI, "[s]tate and local governments share our goal of ensuring that tax burdens on telecommunications carriers are imposed fairly so as not to impede competition."[109]

VI. CONCLUSION

The anecdotal and insubstantial evidence presented in the comments does not establish that local communities' right-of-way or tax policies impede competitive entry. On the contrary,

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(4) In 1996, the Montgomery County, Maryland Council passed a provision over the County Executive's veto, to tax all CMRS providers 92.5 cents for each customer with a billing address in the county (tax effective July 1, 1996). No cases challenging the tax were reported. However, a new Council, elected in 1998, put in abeyance the 'cell phone tax' for the fiscal year 2000. *See Land Mobile Radio News, Vol. 50 No. 26, June 28, 1996; The Baltimore Sun, Sec. 4B, May 21, 1999* (Attachment A).

[108] Comments of Sprint at 13.

[109] NOI at ¶ 82.

there are sound constitutional, legal and practical reasons for the Commission not to intrude into the property relationships between local communities and telecommunications companies, or into local tax policy. The Commission should turn its attention to addressing any barriers that may exist at the federal and national level, where its unique expertise and proper jurisdiction lies.

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